

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUG 5 1968

SAN MARINO ELECTRONIC)
CORPORATION, a California)
corporation,)
)
Cross-Appellant,)
)
vs.)
)
)
GEO. J. MEYER MANUFACTURING)
CO., a Wisconsin corporation,)
)
Cross-Appellee)

No. 22592

Appeal from the United States District Court
for the Central District of California

CROSS-APPELLANT'S REPLY BRIEF

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WM. B. LUCK, CLERK



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THE QUESTION OF WHETHER OR NOT THE PATENT-IN-SUIT HAS BEEN MISUSED BY MEYER IS PURELY ONE OF LAW.

A. Whether Or Not the Trial Court Properly Construed the Transfer Agreement of September 21, 1959, is Purely a Question of Law.

Cross-Appellee, Geo. J. Meyer Manufacturing Co., (hereinafter "Meyer") has clearly misunderstood the significance and impact of the Trial Court's Conclusion of Law No. 18 (R. 1836) which states: "The Court concludes that the terms of the patent transfer agreement are understandable, and the Court has therefore interpreted the contract without regard to extraneous evidence."

As its first line of defense herein, Meyer has adopted the position that cross-appellant, San Marino Electronic Corporation (hereinafter "SME"), has failed in its "fundamental burden" of showing that the findings of the Trial Court have no support in the record or are clearly erroneous. (Meyer Answering Brief, p. 13a) In addition, Meyer has paraphrased extensive portions of the record and transcript in an effort to show that evidence before the Trial Court supports the Trial Court's conclusions as to the meaning of the various clauses of the Patent Transfer Agreement and the Consultant Agreement here at issue. (The terms "Patent Transfer Agreement" and "Consultant Agreement", adopted by the Trial Court in Finding of Fact No. 6, R. 1816-1817, are hereinafter descriptive of that agreement between Industrial Dynamics Corporation, Calhoun and Browning and Meyer dated September 21, 1959.)

From the inception of these proceedings, it has been SME's position that the Patent Transfer Agreement, and the Consultant Agreement, are clear and unambiguous and have meanings clearly determinable from the face thereof. Whether there is or whether there is not ample evidence in the record to support those conclusions of the Trial Court directed to the interpretation and construction of the Patent Transfer and Consultant agreements is a completely irrelevant question. In reaching its conclusions as to the meaning of the Patent Transfer Agreement, and Article XIV thereof, the Trial Court expressly stated that it would not, and did not, consider any other evidence before it than the instrument itself. (Tr.* 330, et seq, 334) If the Trial Court did not consider any extraneous evidence in reaching its interpretation or meaning of the Patent Transfer Agreement, SME now asks why Meyer considers it necessary that SME should parade before this Court evidentiary facts tending to sustain its contentions when such evidence was not considered by the Trial Court? In like manner, SME now asks why, when Meyer, at p. 15 of its Answering Brief, accuses SME of bringing before this Court evidence not before the Trial Court (a hyper-technical point in view of the Trial Court's review of the Leo Meyer deposition; Tr.* 541-542; 745), Meyer now brings before this Court record and transcript citations clearly irrelevant in view of the Trial Court's total reliance on the "four corners" of the instruments at issue? The answers to these questions appear obvious; despite its protestations to the contrary, Meyer is not willing to rely upon the face of the Patent Transfer Agreement in its attempt to sustain the clearly erroneous conclusions as to the meaning thereof drawn by the Trial Court.

As to the misuse of the '640 patent, a major issue before this Court is whether, in view of the plain meaning of Article XIV of the Patent Transfer Agreement, Meyer has misused the '640 patent. It is now, and always has been, SME's contention that Article XIV has a plain and simple meaning; that Industrial Dynamics Corporation was not to make any machines for performing the function of inspecting empty bottles for foreign particles which were competitive with any such machine made by Meyer, for a period of approximately 22 years, anywhere in the world. At pages 30 through 35 of its main brief, SME has exhaustively analyzed the various relevant portions of the Patent Transfer Agreement in an effort to demonstrate the incongruity of the Trial Court's determination that Article XIV is limited in coverage to machines covered by the two patent applications transferred, and is limited in duration to the pendency period of such applications. The major error in such conclusion is that in order to reach it, the Trial Court, faced with language clearly contrary to its conclusion, merely disregarded such language, giving it no force or effect.

As stated in SME's main brief at page 29, it is well established that an instrument must be construed according to all of the terms employed and that the court is not at liberty to disregard words used by the parties or to insert terms not employed by the parties. More specifically, this Court, in the case of General Casualty Co. of America v. Azteca Films, Inc., 278 F.2d 161 (9th Cir., 1960) held that, in interpreting an unambiguous and clearly stated agreement,

"...where a written agreement attempts to cover all relationships of the contracting parties, interpretation to be given the contract is determined, as a matter of law, solely from the instrument itself, if possible, without making any part of the instrument nugatory, or without reaching an absurdity, and the appellate court is free to adopt its own construction."

With these established legal principles in mind, turn to the first example of the fallacies of the Trial Court's conclusions and of Meyer's arguments attempting to sustain such conclusions; the "whereas clause" of the Patent Transfer Agreement. The "whereas clause" provides:

Whereas...are the inventors of a machine, hereinafter called a "bottle inspection machine", which is used to detect and reject bottles coming from a bottle washer which have not been properly washed or which contain foreign matter, for which invention two applications for Letters Patent have been filed... (Emphasis added)

It is Meyer's contention, and the Court's conclusion, that this clause defines the subject matter of the Patent Transfer Agreement as including only machines "described" in the patent applications filed. Meyer states at page 19 of his Answering Brief that it is hard to imagine a better way of defining an invention which is the subject of a sale than to tie it to the description of the invention contained in the patent applications. It is first submitted that such a "tie-definition" is probably the least acceptable of all possible ways of defining the subject of the transfer. Portions of virtually every patent application, including those transferred, "describe" things that are admittedly old. Thus, one must look

to the claims submitted. But which claims? Those first presented or those added during prosecution of the application? If this definition is to be accepted, it is probable that the subject matter of the Patent Transfer Agreement would be one thing before an Office Action issues and another after a responsive amendment, a clearly unacceptable situation. (Ex. 42) More importantly however, the "whereas clause" itself describes a bottle inspection machine as one "which is used to detect and reject bottles coming from a bottle washer which have not been properly washed or which contain foreign matter", a phrase stripped of its plain meaning by the construction of the "Whereas clause" argued for by Meyer, a result to be avoided if an otherwise reasonable interpretation may be given the clause in question. Furthermore, it will be noted that the foregoing definition is immediately followed by the words "for which invention two applications...have been filed....", words clearly identifying the preceding phrase as the definitive phrase.

(Emphasis added) It is submitted, that the only reasonable construction to be given the clause in question is that, if the "Whereas clause" defines the subject matter of the agreement, such definition is found in the phrase "which is used to detect and reject bottles coming from a bottle washer which have not been properly washed or which contain foreign matter,".

Turning now to Article XIV itself, it is SME's contention that the phrase "enter into competition with" must of necessity encompass within its meaning more than that which is "described" in the transferred applications. Such is clearly shown by the operation of Article V. B.giving Meyer the

exclusive right to manufacture the "bottle inspecting machines". And finally, with respect to the phrase in Article XIV, "for the life of this agreement", since Article XIV contains no time limiting language as do other clauses such as Article V.A., it seems clear beyond all argument that the life of the agreement, as defined by Article XIII, necessarily applies with full force and effect to Article XIV. If it were the intention of the parties to the Patent Transfer Agreement that the operative effect of Article XIV be limited to the pendency period of the transferred applications, why does the agreement not so state? The Trial Court could not and did not answer this question as blandly as Meyer would by stating that "It made more sense to tie the pendency of Article XIV to the life of the Agreement than to the period prior to the issuance of patents." Instead, obviously greatly troubled by the plain language of Articles XIV, XIII and V, the Trial Court, relying solely on the "four corners" of the Patent Transfer Agreement, could do no more than declare Article V. B. a "redundancy" and relegate Article XIII to mere "surplusage", thereby completely disregarding the words of the parties in the agreement and, in substance, inserting words not used.

Obviously troubled with the prospect of eliminating the parties language from the agreement and adding terms of its own, the Trial Court, and now Meyer, states that such "redundancy" and "surplusage" was the result of inartistic or untidy draftsmanship. (Finding of Fact No. 15, R. 1823-1824). It is indeed difficult to understand how one could reach such a conclusion from a review of the agreement itself. In a meager

effort to support this conclusion, Meyer now strenuously argues at pages 5, 18, 21 of its Answering Brief that the alleged "redundancy" and "surplusage" was the result of the poor and untidy draftsmanship by a group of approximately 25 people including the parties and their attorneys. This Court will no doubt take notice of the statistical probability that of a random sampling of any 25 people there are bound to be at least two "hit-pickers" that would no doubt catch such "untidy" draftsmanship, if that it be.

In brief summary, it is SME's contention that the Patent Transfer Agreement speaks for itself. The incomplete evidence brought before this Court in attempted support of the Trial Court's erroneous conclusions as to the meaning of Article XIV is completely irrelevant in view of Conclusion of Law No. 18. The plain language of Article XIV can reasonably lead one to no other conclusion than that IDC was prevented from competing with Meyer in the sale of machines for inspecting empty bottles for the presence of foreign particles for a period of approximately 22 years.

B. The Rules of the Cases Heretofore Cited By SME
Control the Instant Controversy.

Meyer's first line of defense is stated as that it could not have been guilty of patent misuse because: 1. The Patent Transfer Agreement dealt with applications rather than patents; and, 2. Meyer has in no way "used" the '640 patent by way of licensing or some other vehicle of use. Turning first to the latter proposition, it is well established that there need be no "use" of a patent in the sense that Meyer would require

in order to invoke the doctrine of patent misuse; the "misuse" referred to ripens the instant the legally assertable patent monopoly is expanded beyond its lawful limits. It is the necessity for restricting the patent monopoly to the statutory grant, irrespective of the method employed in an attempted expansion, that forms the foundation for the invocation of the doctrine of patent misuse. National Lock Washer Co. v. George K. Garrett Co., 137 F.2d 255 (3d Cir., 1943). Thus, it makes no difference whether Meyer has heretofore licensed, enforced or otherwise "used" the '640 patent. It is the monopoly-expanding tendency of Article XIV, in Meyer's hands, to restrain potential competition from other non-infringing empty bottle inspection machines that brings it into conflict with established public policy. Park-In-Theatres v. Paramount-Richards Theatres, 90 F. Supp. 730 (D. Del. 1950).

As a second line of defense, Meyer cites a line of cases at p. 25 of its Answering Brief, not in point with the instant controversy, in its attempt to justify the existence of the non-compete clause, Article XIV, by demonstrating that it came into being pursuant to the sale of an asset of a business. There are two major fallacies with this argument. First, even conceding that the two patent applications transferred constituted a substantial asset of IDC, the fact remains that the Patent Transfer Agreement commemorates the passage of title of patent rights from one party to another. It was long ago held in the Motion Picture cases (243 U.S. 502 (1917)) that there is a distinct line to be drawn in evaluating the legality of general

contract transactions and evaluating the legality of transactions involving patent rights. In the former case, the legality of such transactions are, of course, governed by the general law. However, in the latter case, in view of the grave public policy affecting patent rights, the extent of a patent holder's right to protect his invention is defined and limited to the protection afforded by the patent laws. Secondly, irrespective of the manner of acquisition of patent rights, the cases have established that the law will not condone, by contract, or otherwise, the expansion of the patent monopoly beyond the allowable statutory limits.

As its third line of defense, Meyer contends that the cases cited by SME, and the case of McCullough v. Kammerer Corp. decided by this Court in particular, do not support the proposition that Meyer has misused the '640 patent in the manner contended by SME. At page 27 of its Answering Brief, Meyer gives its reasons for such contention as: first, the cases cited involve issued patents rather than patent applications; second, they involve licensing agreements or distributorship contracts rather than an outright sale of a patent; third, they primarily involved restrictions imposed by the licensor of the patent as a condition of using his patent rather than by the licensee; and finally, the restrictions involve products other than those covered by the patent rather than the very product covered by the patent applications.

With respect to the first of Meyer's contentions, it appears that if Meyer had acquired the issued '640 patent pursuant to the Patent Transfer Agreement, Meyer would accept

the applicability of the cited cases to a question of patent misuse arising therefrom. The absurdity of this distinction is evident in that Meyer would now ask this Court to condone in the transfer of a patent application that which it would not condone in the transfer of a patent. In other words, Meyer would now have this Court adopt the absurd position that while restrictive covenants of the type here concerned amount to an illegal expansion of the monopoly granted pursuant to an issued patent, an expansion of that patent monopoly to an even broader extent to include the pendency period of a patent application is to be condoned. It seems clear beyond all argument that the same practice that is struck down when coupled with an issued patent cannot be allowed to stand when that practice is coupled with nothing more than an inchoate patent right, a right which has not yet even gained the protection afforded by the statutory patent laws.

Turning to Meyer's second contention, it appears that if the Patent Transfer Agreement had encompassed only a license of the '640 patent rights, the cases decided by this Court would be directly applicable. In its main brief, SME has clearly demonstrated that there is no recognizable legal difference between the transaction encompassed within the Patent Transfer Agreement and an exclusive license of the patent applications.

As to Meyer's third proposition, from the language thereof it appears that Meyer argues that while restrictions imposed by a grantor may not be condoned, in some way the

underlying public policy is not offended if the grantee imposes the same restrictions on the grantor. The baselessness of this position is manifest. As stated at pages 47-49 of SME's main brief, anti-competitive restrictions on the grantor have the same or worse prejudice to the public as restrictions on the grantee. In terms of the objectives of the patent laws of advancing technological development, if the grantor, the source of inventive contribution, is removed from the competitive arena, the effect on the public is even worse than where the grantee is restricted. Where restrictions are imposed by the grantee on the grantor, no one benefits except the grantee. It is submitted that whether the cases cited strike down restrictions imposed by the grantee or grantor of patent rights is relatively immaterial; in either case, the evil sought to be prevented is the unlawful expansion of the patent monopoly at the expense of the public's entitlement to free competition.

As to Meyer's fourth proposition, whether or not the restrictions involved in the Patent Transfer Agreement over products other than those covered by the transferred applications is, of course, a question to be decided by this court upon its reading of the face of the instruments in question.

At page 27 of Meyer's brief, Meyer attempts to distinguish the McCullough v. Kammerer Corp. case on the ground that "The Court gave no hint that, if the licensor's covenant had stood alone, there would have been finding of patent misuse." Of course, whether this Court did in fact give that hint is up to this Court to decide. However, in view of the following language quoted from the McCullough case at 166 F.2d, p. 762, it appears that this Court did indeed give a very strong "hint"

that a licensor's covenant not to compete would constitute patent misuse under the circumstances described in this case:

With regard to the licensor's agreement with the licensee to make more certain the licensee's profit by extending the monopoly area by excluding itself from making, using, renting or licensing competitive cutters, such a patent monopoly extension by the agreement of the licensor has the same prejudice to the public as the restricting agreement of the licensee....

For the reasons stated hereinbefore, and more exhaustively set forth in SME's main brief, it is contended that the McCullough case sets forth legal principles directly applicable to the instant case establishing Meyer's misuse of the '640 patent.

Finally, Meyer relies upon the argument that the agreement of June 23, 1966 effectively purged any misuse, if there be. As its main contention, Meyer states at page 29 of its Answering Brief that Article XIV was ineffective after the '640 patent issued because the patent then precluded manufacturing the machine covered by the patents. This, of course, presupposes the erroneous meaning attributed to Article XIV by Meyer and adopted by the Trial Court. Furthermore, as demonstrated in SME's main brief, Meyer has made no effort to dissipate the effects of a seven year restriction. Meyer attempted to show that Calhoun and Browning have continued to invent new devices, including several for the inspection of bottles. The fact remains, however, as found by the Trial Court, neither Calhoun nor Browning nor any company with which they are, or have been, associated since the execution of the

Patent Transfer Agreement, has manufactured or sold a machine for inspecting empty bottles for foreign particles. (Finding of Fact No. 20, R. 1825) Further, all improvements in such machines and other inventions made by Calhoun, Browning or IDC, Ltd. relating to electronic applications in the bottle inspecting industry have either passed directly to Meyer royalty free or have been marketed by Meyer. (Finding of Fact No's. 21, 23, 24; R. 1825-1826; R. 1827-1828) During the same period, however, Wyman, untrammelled by the restrictive effects of the Patent Transfer Agreement, has developed and marketed a successful empty bottle inspection machine.

Summarizing briefly, the cases cited by SME in its main brief establish the proposition that the expansion of the patent monopoly beyond its statutorily defined scope is not to be condoned irrespective of the means employed. More specifically, where, as here, an agreement is made pursuant to the transfer of patent rights whereby the inventor of the patent in question is removed from competition with the grantee in the field covered by the patent, such agreement goes far beyond the scope of the lawful patent monopoly. For these reasons, the extraction of Article XIV pursuant to the transfer of rights in the '640 patent renders such patent unenforceable.

II.

THERE IS AMPLE BASIS IN THE RECORD AND LEGAL PRECEDENCE FOR DISTURBING THE TRIAL COURT'S RULING ON FEES AND COSTS.

SME has heretofore in its main brief exhaustively set forth the legal bases upon which its request for attorney's

ees is now based. To reiterate briefly, it is SME's contention that by virtue of Meyer's misuse of the '640 patent; its fraud upon the Patent Office in withholding relevant prior art; and Meyer's prosecution of a patent containing invalid claims presented more than one year after a prior public use or sale, Meyer has demonstrated such 'unfairness and bad faith that it is unjust that SME bear the burden of its costs of litigation.

A. Meyer's Fraud on the Patent Office

Meyer has attempted to rebut SME's contentions of fraud on the Patent Office in its withholding of relevant prior art by contending: 1) That the Stoate '229 patent is not relevant because it does not include teachings of "spatial filtering"; and, 2) That SME failed to prove that Meyer's attorneys were convinced of the relevance of such prior art.

Turning to the first contention, upon review of SME's Answering Brief in Case No. 22592-A, it becomes painfully obvious that, even assuming but not admitting that Stoate '229 does not teach "spatial filtering", the '640 patent neither uses nor contemplates any such term. Again, Meyer has done nothing more than insert issues which serve only to obfuscate the true issues before this Court. Clearly, if neither the term itself nor any reference to "spatial filtering" is to be found in the '640 patent, whether or not Stoate '229 teaches "spatial filtering" in addition to the concept of a centered optical system is irrelevant to the question of whether or not such patent is anticipatory prior art with respect to the '640 patent. The Trial Court specifically found that the Stoate '229 patent was relevant to and anticipated the claims of the '640 patent.

(Finding of Fact No's. 11, 15 (a), R. 1942, 1944) Yet Meyer contends, at p. 45 of its Answering Brief, that since it was not cited by the Patent Examiner, Stoate '229 was not pertinent. The untenable position reached in the logical extension of such a contention is that no prior art could be relevant unless cited by the Applicant or an Examiner during prosecution.

Turning to Meyer's second contention, the question of whether or not Meyer's Los Angeles attorneys were convinced of the relevance of the Stoate '229 patent is irrelevant to the issue of fraud. As stated at page 43 of Meyer's Answering Brief, "... the Stoate patent in question came to the attention of Meyer's Milwaukee patent attorneys who were in charge of prosecuting the British patent application,..." It is SME's contention that in failing to find that Meyer had perpetrated a fraud on the Patent Office, the Trial Court erroneously relied upon the statement of the Los Angeles attorneys' representing Meyer at trial, that they were not convinced of the relevance of the Stoate '229 patent, a statement wholly irrelevant to the question of whether Meyer itself was aware of the patent. The question of Meyer's fraud on the Patent Office centers around Meyer's knowledge of the Stoate '229 patent and not on the knowledge of the attorneys prosecuting the United States application, i.e., the application for the '640 patent. By Meyer's own admission, Meyer was aware of the existence of the '229 patent. The Trial Court considered it relevant to the teachings of the '640 patent. Thus, there is ample evidence before the Trial Court that would sustain the conclusion that Meyer had practiced a fraud on the Patent Office by not citing

or bringing to its attention the Stoate '229 patent. Yet, instead of turning to such evidence, the Trial Court relied upon the irrelevant non-evidentiary statement of one of Meyer's attorneys as the sole support for its conclusion. It is this error, combined with the evidence before the Trial Court, upon which SME bases its contention that the Trial Court's findings were clearly erroneous. SME has no burden whatsoever to prove that Meyer's attorneys were convinced of the relevance of the teachings of the Stoate '229 patent.

Turning to Meyer's misrepresentation of the commercial success of machines corresponding to the claims of the continuation application, SME apologizes for its perhaps over-
simplifying use of the word "stipulation" in reference to the absence of controversy over the number of bottling plants to which Meyer could have sold its machines. (SME Main Brief, p. 79) Despite Meyer's objection to the use of the word, the record clearly demonstrates that there was no dispute over the figures themselves. Despite the figures stated, Meyer now blandly points to the Trial Court's finding of commercial success in justification of its statement without any attempt to relate that finding to either the time element involved or the basis for such alleged success. It surely cannot be said that such off-hand attempts at substantiation will now rectify the adverse effect of the representation.

B. Late Presented Claims

At pages 87-93 of its main brief, SME has extensively analyzed the manner of, and the extent to which, the invention claimed by the claims first presented during prosecution of the

continuation application differs from that invention defined by the fourteen allowed claims of the parent application. Yet Meyer has directed no part of its Answering Brief to a rebuttal of the facts presented. Instead, it has chosen to rely upon (1) SME's failure to submit findings of fact directed to the issue of late presented claims to the Trial Court; (2) a misinterpretation of the case of Muncie Gear Works v. Outboard Marine and Mfg. Corp., 315 U.S. 759, 62 S. Ct. 865 (1942); and (3) the fallacious reasoning that the "omnibus", or catch-all, claim No. 15 filed with the parent application ties the invention claimed in the continuation application to the original disclosure of the parent application.

Turning to the first of Meyer's propositions, while the Trial Court had before it all of the evidence and "vigorous" arguments by both parties, it expressly declined to consider the issue of late presented claims. In view of the Trial Court's explicit language, and the duties of accurate reflection imposed on counsel directed to prepare findings of fact and conclusions of law, it would have been futile, if not improper, for SME to present detailed findings and conclusions on the issues of Meyer's late claiming. (Tr. 2612-2613; R. 1866-1867)

As to Meyer's second proposition, it appears that Meyer interprets the Muncie Gear case, and cases following it, as being limited to the negatively stated rule that if the description portion of a specification and the drawings remain unchanged, later added claims are valid irrespective of the essence or breadth of the late claims. It is submitted that such an interpretation is wholly erroneous; the clear inquiry

demanded by the Muncie Gear case and cases following is whether or not the essence or focal point of the invention defined by the late claims may be fully deduced from the earlier disclosure taken as a whole-description, drawings and claims. It is not enough that the description and the drawings remain unchanged from the original disclosure; if the late claims define an invention not fully disclosed by the earlier filing, the late claims may not be accorded the earlier filing date. Pursche v. Atlas Scraper and Engineering Co., 300 F.2d 467 (9th Cir., 1961); Chicopee Mfg. Corp. v. Kendall Co., 228 F.2d 719 (4th Cir., 1961).

Finally, Meyer attempts to remove itself from the operation of the Muncie Gear doctrine by contending that by virtue of the unchanged description and drawings, and the "omnibus" claim No. 15, the scope of the invention stated in the parent application "... extended to and included the matter covered in..." the continuation application. (Pursche v. Atlas Scraper and Engineering Co., 300 F.2d at 477) Much has been written about the substantive effect of "omnibus" claims such as that quoted at p. 55 of Meyer's Answering Brief -- but not in recent years. It is now clearly established that they are non-statutory claims which fail to particularly point out any asserted invention and may be cancelled unilaterally by an Examiner's amendment pursuant to 35 U.S.C. §112. Manual of Patent Examining Procedure, §706.03 (h). More specifically, in response to the question "Does a claim such as 'the invention substantially shown and described' protect against the late-claiming problem?", Mr. William E. Schuyler, Jr., an eminent patent law practitioner and then Chairman-Elect, Patent, Trademark and Copyright Section,

American Bar Association, stated: "...it is my own opinion that an omnibus claim of the type mentioned would not help in the late-claiming problem." The Art of Drafting Patent Claims, p. 46 (Practising Law Institute, 1966, edited by J. G. Jackson, G. M. Morris) In short, the "omnibus" claim adds absolutely nothing to either the scope or breadth of an asserted invention defined by other disclosed claims and is an unacceptable method of claiming. Yet, astonishing as it may seem, Meyer is now contending that the omnibus claim No. 15 provides an otherwise absent antecedent support for the greatly expanded and newly inventive claims added during prosecution of the continuation application.

For the reasons stated in its main brief, and in view of the cases cited therein, it is submitted that Meyer's reliance on the knowingly late presented claims of the '640 patent amount to such bad faith as to warrant an award of attorney's fees to SME.

III.

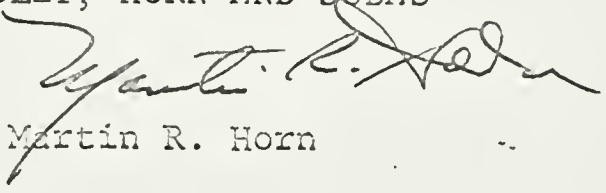
Conclusion

The Trial Court interpreted the Patent Transfer Agreement from its "four corners" without regard to any extraneous evidence. Whether or not the Trial Court correctly interpreted the agreement is purely a question of law neither requiring nor admitting of the presentation of irrelevant extraneous evidence to this Court. In view of all of the express language used by the parties to the Patent Transfer Agreement, Article XIV can only have the plain meaning herein contended for by SME. To the extent that purported findings of fact state the opposite conclusion, there are clearly erroneous

as a matter of law. In view of the plain meaning of Article XIV
as a boiler plate non-competitive clause, and the cases cited in
SYE's main brief, as a matter of law Meyer has misused the '640
patent without benefit of a redeeming purge of the effects of the
misuse. Having this proceeded in bad faith upon patent rights
fraudulently obtained and invalid from their inception, Meyer
should be made to bear the burden of this expensive litigation;
a burden which may be imposed with equal facility by this Court
or the court below on remand of the proceedings.

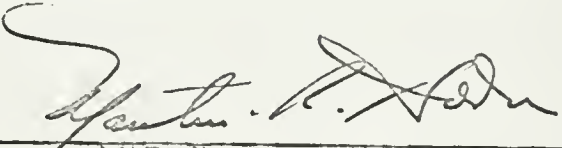
Respectfully submitted,

SPENSLEY, HORN AND JUBAS


By: Martin R. Horn

CERTIFICATE

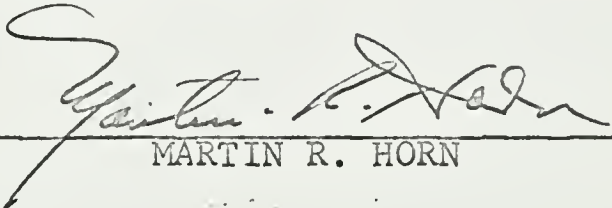
I certify that, in connection with the preparation of this Reply Brief, I have examined Rule 28 of the Federal Rules of Appellate Procedure, and that, in my opinion, the foregoing Reply Brief is in full compliance with that Rule.



MARTIN R. HORN

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that three (3) copies of the within Brief were this 31st day of July, 1968, served upon Ellsworth R. Roston, Esq. of Smyth, Roston and Pavitt, Attorneys for Cross-Appellee, by enclosing the same in a postpaid wrapper addressed to said attorney at Suite 320, 4262 Wilshire Boulevard, Los Angeles, 5, California, and depositing the same in the United States mail.



MARTIN R. HORN

